(6)

IN THE

Supreme Court of the United States

October Term, 1928

Case No. 273.

CHRYSLER SALES CORPORATION,
Plaintiff-Appellant,

v.

WILBUR D. SPENCER, as Commissioner of Insurance of the State of Maine,
Defendant-Appellee.

Case No. 274.

UTTERBACK-GLEASON COMPANY,
Plaintiff-Appellant,

v.

WILBUR D. SPENCER, as Commissioner of Insurance of the State of Maine,
Defendant-Appellee.

Case No. 286.

CLARK MOTOR COMPANY,
Plaintiff-Appellant,

v.

W. STANLEY SMITH, as Commissioner of Insurance of the State of Wisconsin,
Defendant-Appellee.

Case No. 287.

CHRYSLER SALES CORPORATION,
Plaintiff-Appellant,

v.

W. STANLEY SMITH, as Commissioner of Insurance of the State of Wisconsin,
Defendant-Appellee.

ON DIRECT APPEAL FROM THE STATUTORY COURTS—UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WISCONSIN AND UNITED STATES DISTRICT COURT, DISTRICT OF MAINE, SOUTHERN DIVISION.

SUPPLEMENT TO BRIEF FOR APPELLANTS

(Plaintiffs Below.)

Additional Authorities on Jurisdiction.

DUANE R. DILLS,
Counsel for Plaintiffs-Appellants.

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QUESTION OF JURISDICTION.

In Cases No. 273 and 274, the Attorney General of Maine in his brief, at pages 5 and 6, relies particularly upon the case of *Fitz* v. *McGhee*, 172 U. S. 516, to show that this court has no jurisdiction in the cases at bar, and that the suit is one against the state. In Cases Nos. 286 and 287, the Attorney General of Wisconsin in his brief, at page 48, also relies upon the said case of *Fitz* v. *McGhee* to show that this court has no jurisdiction.

The Attorneys General of Maine and Wisconsin apparently overlooked the discussion of the case of *Fitz* v. *McGhee* in the later case of *Ex Parte Young*, 209 U. S. 123, at page 156. Mr. Justice Peckam in that case points out that in *Fitz* v. *McGhee* the penalties were to be collected from individuals paying an excess bridge toll over that prescribed by the state statute. They were therefore private suits in which the state officials were not concerned. The state statute could not be tested by an injunction against the state officers, because they were not parties to the threatened actions against the petitioners. The indictments in that case were under a different statute from the alleged unconstitutional statute fixing the toll rates. The constitutionality of the penal statute was not questioned, and therefore had no relation to the case. In *Ex Parte Young* Mr. Justice Harlan dissented. He wrote the opinion in *Fitz* v. *McGhee*.

Since writing our brief and giving authorities for the jurisdiction of this court on pages 4 and 5, we have also found other cases which if the court wishes to consider the matter further might be of help.

Greene v. *Louisville & I. R. Co.*, 244 U. S. 499, holds that the state officer to be enjoined need have only a relation to the enforcement of the alleged unconstitutional statute and need not be the specific officer charged with bringing the actions under that statute; that the suit against such state officer is not a suit against the state, following *Ex Parte Young;* and that the jurisdiction includes all questions of state law irrespective of what disposition might be made of the federal question, or whether it might be necessary to decide the federal question at all. To the same effect see *Risty* v. *C. R. I. & P. Ry. Co.* (C. C. A. 8), 1924—297 Fed. 710, at page 722.

Siler, et al. v. *Louisville & Nashville R. Co.*, 213 U. S. 175, in which case there was no diversity of citizenship, but the court held jurisdiction on the ground that the statute was alleged to deprive the complainant of property without due process of law, and denied the complainant equal protection of the laws. The court held at page 191 that the federal questions having been raised, it could retain jurisdiction to determine the state questions.

To the same effect see also *La. P. S. Com.* v. *M. L., etc. Co.*, 264 U. S. 393, at page 395; *Hebe Co.* v. *Shaw*, 248 U. S. 297. For further authorities see *Weyman-Bruton Co.* v. *Ladd* (C. C. A. 8), 231 Fed. 898, holding that injunctions were proper against criminal prosecutions threatened to be brought under an alleged unconstitutional statute. See also *Carolene Products Co.* v. *Mahoney* (D. C. Mass.), 294 Fed. 902; affirmed (C. C. A. 1) 2 Fed. (2) 366; *Royal Baking Powder Co.* v. *Emerson* (C. C. A. 8), 270 Fed. 429; *Benedicto, Treasurer* v. *Porto Rican-American Tobacco Co.* (C. C. A. 1), 256 Fed. 422; *Mutual Life Insurance Co.* v. *Boyle* (C. C. Kans.), 82 Fed. 705.

The cases decided by the Supreme Court of Wisconsin which would bear out the same propositions of law are—

Sperry & Hutchinson Co. v. *Weigle*, 169 Wis. 562;

State ex rel. v. *W. Stanley Smith, Insurance Commissioner*, 184 Wis. 455.

Respectfully,

DUANE R. DILLS,
Counsel.

(6a)

Supreme Court of the United States

Utterback-Gleason Company,
Appellant

vs.

Wilbur D. Spencer,
Insurance Commissioner of the State of Maine
Appellee.

No. 274

October Term 1925 No. 904. Filed January 21, 1926

Chrysler Sales Corporation,
Appellant

vs.

Wilbur D. Spencer,
Insurance Commissioner of the State of Maine,
Appellee.

No. 273

October Term 1926 No. 273. Filed January 21, 1926.

Appeal from the District Court of the United States
for the District of Maine

BRIEF OF DEFENDANT,
APPELLEE WILBUR D. SPENCER

Attorneys:

RAYMOND FELLOWS, Attorney General of Maine
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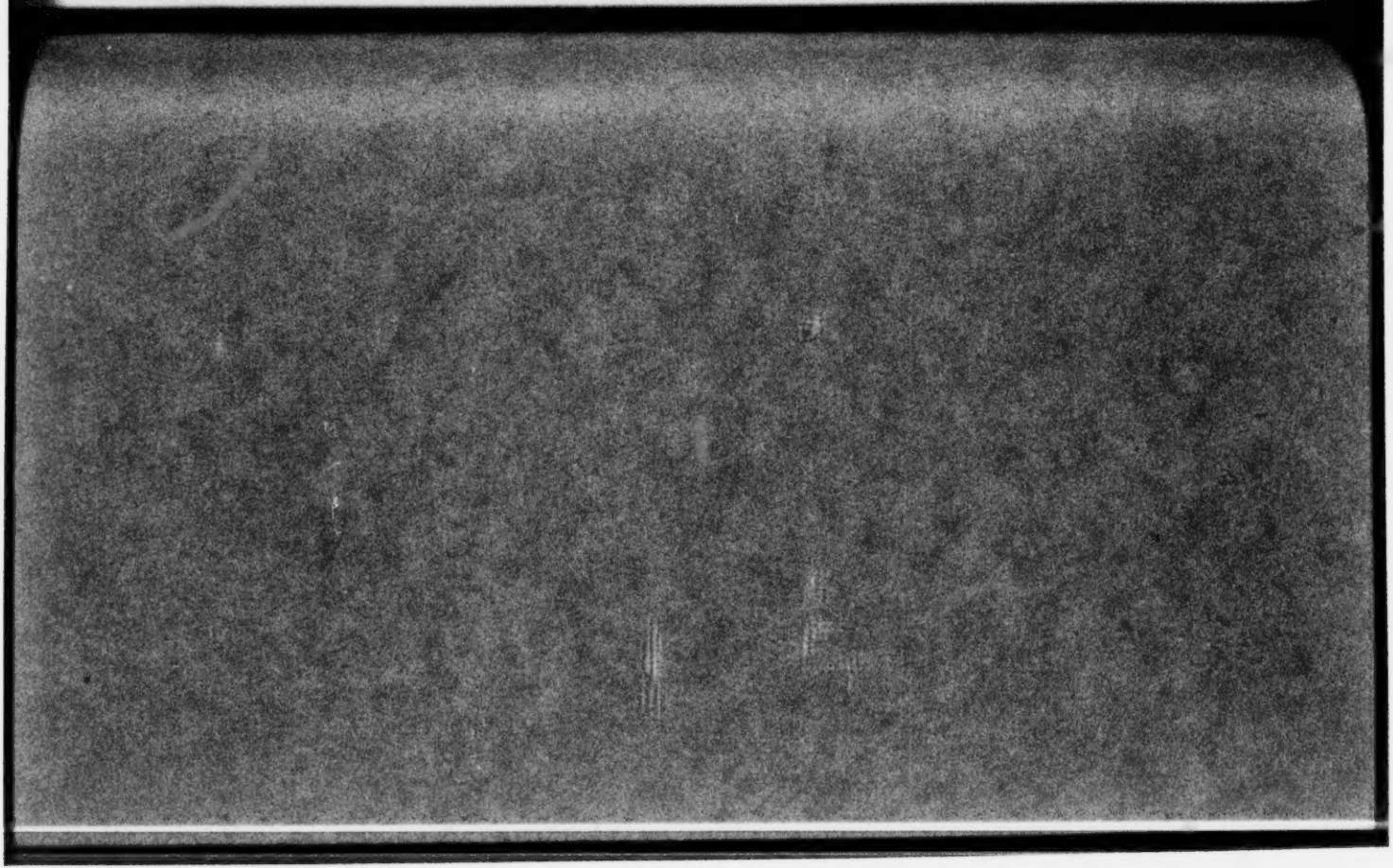

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APPELLEE WILBUR D. SPENCER

Attorneys:

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J. F. GOULD

These two bills in equity ask for temporary and permanent injunction restraining the Insurance Commissioner of the State of Maine from enforcing or attempting to enforce the insurance laws of the State, which forbid the soliciting, receiving or forwarding of any risk or application for insurance by one not a licensed agent.

For opinion of court below, dated December 19, 1925, see Record page 35 and 36.

In the first bill, jurisdiction of the Court is claimed on the ground that the plaintiff, Chrysler Sales Corporation, is a citizen of the State of Michigan and in the other that the action arises under the Constitution and laws of the United States,—the plaintiff, Utterback-Gleason Company, being a Maine corporation engaged in selling automobiles as a dealer for the Chrysler Corporation.

Briefly the facts are these: The Chrysler Sales Corporation sells Chrysler automobiles to distributors and dealers. These automobiles are covered by a blanket fire and theft insurance policy issued by the Palmetto Fire Insurance Company, which company is not licensed to do business in Maine. This policy of insurance purports to cover against loss by fire or theft for a period of one year all Chrysler cars sold by the retail dealer. The retail dealer reports to the Chrysler Sales Corporation the name of the purchaser of the automobile, date of sale, motor number, style, etc., and the Sales Corporation notifies the Palmetto Company, whereby the purchaser becomes protected under the original policy. The defendant, as Insurance Commissioner, has ruled that the dealer, not being a licensed insurance agent, is violating the statutes of Maine which provide that "if any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums he shall be punished, etc." This opinion of the Commissioner was based on the

ground that the Chrysler dealer "solicits, receives and forwards" the risk, and by accepting the price of the car which is made up in part of the insurance premium, "procures risks and receives money for premiums". In other words, there are several distinct violations of the resident agency insurance laws of Maine.

Revised Statutes of Maine,
Chapter 53, Sections 121, 123, 124, 129.

Under this "master policy", the dealer sells cars and insurance at one stroke. Without the dealer the insurance would not and could not be effected. The insurance is a part and advertised as a part of the contract of sale. The insurance premium is admittedly included in and is a part of the final and ultimate purchase price paid by the purchaser.

The contract of insurance evades the laws of the State of Maine which were enacted for the purpose of supervising, regulating and taxing the business of insurance. The contract also allows the unauthorized Palmetto Company to escape the safeguards and restrictions imposed by the Maine laws upon companies authorized to do business in this State.

JURISDICTION

The State of Maine feels that it is in duty bound to respectfully point out to the Court what it believes to be its constitutional and sovereign rights, for the reason that it must do all in its power to protect its own citizens.

A Federal Court always presumes that it is without jurisdiction until the contrary affirmatively appears.

Danks v. Gordon, 272 Fed. 821.
Mattingly v. Northwestern V. R. Co.
158 U. S. 53.

It is the sovereign right and duty of the State of Maine to regulate the business of insurance, as it affects the wealth, health, comfort and prosperity of its people, and is not commerce.

Paul v. Virginia, 75 U. S. (8 Wall.) 168.
Mer. Mut. Lia. Ins. Co. v. Smart, 267 U. S. 127.
Nutting v. Mass., 183 Mass. 553.
Allegeyer v. Louisiana, 165 U. S. 578.
N. Y. Life Ins. Co. v. Deer Lodge County,
231 U. S. 495.
German Alliance Ins. Co. v. Lewis,
233 U. S. 389.

These suits in equity are brought against the State itself, and it is a fundamental rule of law that neither a sovereign nor its public officers, as such, can be sued in its own courts, or in any other Courts, except where consent and permission so to do has been given by express Legislative Enactment.

Briggs v Light Boats, 93 Mass. 162, 175.
Beers v. State of Arkansas,
20 How. (U. S.) 527, 529.
Murray v. Wilson Distilling Co.
213 U. S. 151.
Smith v. Reeves, 178 U. S. 436,
Louisiana v. McAdoo, 234 U. S. 627.
See also Chisholm v. Georgia, 2 Dallas 419, which decision was abrogated by the Eleventh Amendment.

The insurance laws of Maine have established an Insurance Department and placed the same under the charge of a Commissioner with power to grant and revoke licenses to companies and agents in his judgment. He is not specially charged with the duty of enforcing the criminal insurance laws, for this duty is for the sixteen county attorneys, and in fact for seven hundred thousand citizens, any one of whom may make complaint. No injunction will therefore lie.

Fitts v. McGhee, 172 U. S. 516.
Ex Parte Young, 209 U. S. 156.
See Rose's Notes, Vol. 18, (172 U. S. 516)
44 L. R. A. (N. S.) 216, 224.

The case of Fitts v. McGhee, 172 U. S. 516, discusses the principle at length and holds that an officer specially charged with the execution of a state enactment alleged to be unconstitutional an injunction will sometime lie, but none (as in the case at bar) where officer not expressly directed to enforce, and the statute a criminal one. The citizen should await action and litigate the questions.

See 32 C. J. 279, 281, 981.
Prout v. Starr, 188 U. S. 543.

If the State statute not properly construed, resort must be had to the State courts. To prevent being accused of crime equity is powerless.

Arbuckle v. Blackburn, 113 Fed. 616,
app. dis. 191 U. S. 405.
Camden Ry. v. Catlettsburg, 129 Fed. 427.

CLAIMS OF APPELLANTS

The appellants claim that the Chrysler Company has a right to sell its property, and the contemplated action of the Commissioner will prevent Utterback-Gleason from making sales; that the dealers are in no sense "agents" within the meaning of the Revised Statutes of Maine, and take no part in "writing of placing" the contract; that the dealer cannot separate the premium from the cost of the car; that if the statutes are "properly construed" they have no application here, and, if construed to apply, are violating the Federal Constitution as regulating interstate commerce, impairing freedom of contract, taking property without due process, and denying full faith and credit; that the proposed Chrysler plan is a valid one and does not infringe upon the State Laws.

In this state "A contract of insurance, life excepted, is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured upon the destruction or injury of something

in which the other party has an interest. And the business involving the issuance of such contracts in this state shall be carried on only by duly incorporated insurance companies."

Chapter 53, Section 1, Revised Statutes of Maine.

The Michigan Agreement between the Chrysler and the Palmetto is not a policy but a treaty to provide insurance as occasion might arise, upon property not in existence, to inure to the benefit and "on account of whom it may concern." Marine insurance it is called, but this treaty has undertaken to extend the principle of insuring the various interests involved in transportation of commodities by adding a distinct provision to insure the ultimate purchaser of the Chrysler product after interstate commerce has ceased and the marine hazard has terminated.

Under the Chrysler Treaty, the Palmetto, a foreign fire insurance company unauthorized to transact insurance in Maine, has waived the right to reject any purchaser of the Chrysler product as uninsurable who accepts the entire contract and pays the cumulative consideration, in which insurance has been called an item of overhead expense.

When compared with the Maine Standard Policy provisions, the position of the parties accepting the terms of insurance are reversed, for the retailer cannot sell a Chrysler automobile under its plan without effecting insurance with the purchaser on a new risk, in which the contracting parties are entirely different. In other words, the Palmetto waived consent when its Chrysler Treaty was executed and each new assured must accept its terms upon receipt of its commodity and payment of a consideration therefor. In the Maine Standard Policy, the insurance carrier retains the right to reject an undesirable transferee of title when the moral hazard may seem unsuitable.

The Chrysler Treaty proffers to the purchasers of all retail Chrysler automobiles indemnity against losses by fire,

and theft for one year. It is defined as excess insurance and may not be resorted to when the purchaser has provided other insurance which is adequate to compensate the loss. It is non-cancellable by its terms and all unabsorbed premiums are forfeited to the insurance carrier. Suit for recovery cannot be brought in Maine but the description of the plan itself implies that litigation will not be necessary as it is for the admitted interest of the Chrysler that all losses be adjusted without suit and to the full "satisfaction" of the assured, a position that is novel and against public policy, since all courts have discouraged the payment of fraudulent claims for two hundred years.

The Chrysler Treaty is Subversive of the Fundamental Principles of Insurance, which Unregulated will Result in Abuses.

1. It proffers and effects insurance without supervision by the State or Federal Government.

2. It proposes and effects insurance without consideration for the moral hazards involved.

3. It is compulsory and discriminatory since purchasers pay the same premiums for various terms.

4. It extends the interest of the assured, in the first instance, beyond the limit of the marine adventure.

5. It interferes with all reasonable regulation of insurance contracts by the State.

6. The reserve for losses must be sustained by voluntary donations from a foreign corporation.

7. It diverts premiums beyond the reach of legitimate local taxation.

8. It will lead to exemptions from other forms of local taxation and traffic regulation in defiance of reasonable state statutes and rights.

9. It violates the principle enunciated by the Supreme Court itself that "the public interest requires the distribution of loss over a wide area."

10. It substitutes special privilege, or negation of regulation, for public interest, with which insurance is affected.

The Claims of the Appellants

First. That a Maine retailer, who has become the absolute owner of Chrysler automobiles, is not effecting insurance risks when he retails such automobiles within the State and negotiates fire and theft insurance thereon with Maine purchasers, in compliance with the proposals of a treaty made in Michigan by the Chrysler with the Palmetto, a fire insurance company of South Carolina, which is unauthorized to transact any kind of insurance in Maine.

Second. That if the retailer is effecting insurance risks, he and the Chrysler should not be subjected to state regulation in negotiating such insurance for ultimate purchasers of Chrysler automobiles at retail in Maine and that the statutes of the state governing the transaction of insurance, to wit, Sections 121, 122 and 129, Chapter 53 of the Revised Statutes, and amendments thereto, are inapplicable and inoperative with reference to the acts of the corporation and retailers in Maine.

(a) Because the Chrysler Treaty, which purports to have been made in Michigan, is incontestable in Maine.

(b) Because enforcement of pre-existent statutes of Maine governing the initiation and maintenance of insurance risks through Maine agents and brokers will restrict or "burden" interstate commerce by interference with the plan to provide all ultimate purchasers of Chrysler automobiles with fire and theft insurance in accord with the proposals of the Palmetto in the specifications of the Chrysler Treaty.

(c) Because their contractural rights under the Fourteenth Amendment will be invaded in Maine and their business and profits reduced by state regulation of the insurance proposals arranged under the Chrysler Treaty.

The Defendant Claims,

First. The retailer of Chrysler automobiles effects insurance in Maine.

The Chrysler is not designated in its charter of incorporation as an insurance company nor broker and is not eligible to effect insurance within the State of Maine by itself or by agents or brokers. (Chapter 53, Section 1, Revised Statutes of Maine.) In case of sale of a Chrysler automobile in Maine the retailer, who has been designated in the Chrysler Treaty and instructed by the Palmetto as its agent for that special purpose, accepts a composite consideration and effects a risk of insurance within the state. He also reports the sale to the Chrysler at Detroit, Michigan, giving the name of the purchaser (new assured), date of sale (beginning of new risk period), motor number, style, etc. (every descriptive element necessary to issue an ordinary policy). This procedure is merely the employment of a code system which in plain English, means: "Insure Car Number XX for your new assured John Doe, of Augusta, Maine, and charge the premium to my former remittance on account of the same."

Indeed, the instructions to the retailer from the Chrysler were broader than the occasion required. The retailer was informed that no Chrysler automobile could be sold without insurance; that the Palmetto was the insurer; that the Palmetto had been reinsured by one of the largest automobile insurance companies in the country; that the property was insured against the hazard of loss from fire and theft; that the insurance was safe and the adjustment would be satisfactory to the assured; that a certificate of insurance would be delivered to the purchaser in consideration for a premium which the purchaser pays when he pays for the automobile; that the premium is lower than that provided for other insurance on account of the mass purchasing power of the automobile company; that the insurance was purchased at wholesale by the Chrysler for the benefit of every purchaser of a Chrysler automobile.

The retailer effects insurance on property which is situated in Maine, and belongs to himself absolutely, unaffected by commercial regulation by the Federal government or the most liberal interpretation of marine insurance limitations.

The premium, although intentionally submerged in the term "delivery charges" is, nevertheless, a real and tangible consideration for insurance indemnity, paid by the purchaser, and implies assent to the entire contract, in compliance with the proffer of automobile and insurance in combination.

If the premiums were absorbed during the passage of the property through carrier, distributor and retailer, as claimed by the Palmetto, the new insurance contract would be without consideration and void in Michigan as well as in Maine, and any creation of reserves to liquidate losses would be purely voluntary on the part of the Chrysler.

Furthermore, the plaintiff is not the proper party in equity to segregate, at his caprice, the separate prices at which more than one commodity or privilege may be rated when sold in combination, and especially where the avoidance of a penal statute may result from assigning fictitious or no prices to commodities or privileges of value. In construing such procedure the object attained is more conclusive than any method by which it may be effected.

The Supreme Court of the United States has already decided that while a resident could not be restrained in his freedom to contract for his own insurance with a foreign unlicensed company the state could "prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making." And the court added that the state "may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons."

Nutting v. Massachusetts, 183 U. S. 558.

See also opinion of court—Record page 40 (No. 273)
Record page 41 (No. 904)

If the insurance "were obtained for the resident by a broker who was himself a resident, this would be a procuring within the state." Even the collection of insurance premiums in a state for an insurance company of another state is doing business within the former state.

Hooper v. California, 155 U. S. 648.
Calif. Mut. Life Ins. Co. v. Spratley, 172 U. S. 602.

The court has proceeded farther in defining the civil liability of agents and brokers on the ground that there is a "vital distinction between acts done within and acts done beyond a State's jurisdiction."

Allgeyer v. Louisiana, 165 U. S. 588.

The dictum declared that "A state can lawfully punish or regulate, by imposition of civil liability, or otherwise, the doing of acts within the territory of such state by agents for foreign insurance companies calculated to neutralize and make ineffective the statute which prescribed conditions upon which alone the right existed in a foreign insurance corporation to do business within the state."

Hooper v. California, 155 U. S. 657.

The Chrysler Treaty is an executory agreement in which the essence of legal obligation on the part of the Palmetto is not the sale of commodities but services to be performed at future time in effecting, through Maine retailers of Chrysler automobiles, insurance upon property of Maine purchasers after it has become private property within the State, in violation of pre-existent statutes which prohibit the acts of agency for unauthorized companies by unlicensed residents.

The retailer of Chrysler automobiles, which, as alleged in the complaint, he owns outright, is performing the services of an agent for the Palmetto under the Chrysler Treaty, as well as those of a broker for the purchaser of the auto-

mobile. When he performs insurance functions by an understanding with the insurance company and effects insurance thereby, he is *de facto* an insurance agent for the Palmetto and when he so acts without a license from the insurance department of Maine, he is violating police regulations officially designated as Sections 121, 122 and 129 of Chapter 53 of the Revised Statutes of Maine, and amendments thereto, and should not be permitted to deprive citizens of Maine of the full protection of the laws.

The Maine statutory provisions which manifestly interfere with the operation of the Chrysler Treaty are the following:

> Sec. 121. The insurance commissioner may issue a license to any person to act as an agent of a domestic insurance company, upon his filing with the commissioner a certificate from the company or association, or its authorized agent, empowering him so to act; and to any resident of the state to act as an agent of any foreign insurance company, which has received a license to do business in the state as provided in section one hundred and five or section one hundred and fifty, upon his filing such certificate. Such license shall continue until the first day of the next July. If any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he shall be punished by a fine not exceeding two hundred dollars, or imprisonment not exceeding sixty days for each offense; but any policy issued on such application binds the company if otherwise valid. Agents of duly authorized insurance companies may place risks with agents of other duly authorized companies when necessary for the adequate insurance of property, persons or interests. An insurance agent shall be personally liable on all contracts of insurance unlaw-

fully made by or through him, directly or indirectly, for or in behalf of any company not authorized to do business in the state. Nothing herein contained shall require a duly licensed insurance agent or broker to obtain any license for an employee doing only clerical office work in the office of said agent or broker.

"Sec. 122. The insurance commissioner may license any person as broker to negotiate contracts of insurance for others than himself for a compensation, by virtue of which license he may effect insurance with any domestic company or its agents; or any resident of the state to negotiate such contracts and effect insurance with the agents of any foreign company who have been licensed to do business in this state as provided in sections one hundred and five and one hundred and twenty-one, but with no others; said license shall remain in force one year unless revoked as hereinafter provided. Whoever, without such license, assumes to act as such broker, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment not more than sixty days for each offense. The insurance commissioner, after reasonable notice, may revoke the license of any agent or broker for violation of the insurance laws; or the license of any agent upon receipt of written request therefor from the company filed in the office of said commissioner.

"Sec. 129. No insurance company transacting fire or liability insurance in this state, and no agent or broker transacting fire or liability insurance, either personally or by any other party, shall offer, promise, allow, give, set-off, or pay, directly or indirectly, as an inducement to fire or liability insurance on any risk in this state, now or hereafter to be written, any rebate of or part of the premium payable on any

policy or of the agent's commission thereon; nor shall any such company, agent or broker, personally or otherwise, offer, promise, allow, give, set-off or pay, directly or indirectly, as an inducement to such fire or liability insurance any earning, profit, dividends or other benefit, founded, arising, accruing or to accrue on such insurance, or therefrom, or other valuable consideration, or any special favor which is not specified, promised or provided for in the policy of insurance, nor shall any such company, agent or broker, personally or otherwise, offer, promise, give or sell as an inducement to such insurance any stocks, bonds, securities or property, or any dividends or profits accruing or to accrue thereon, nor, except as specified in the policy, offer, promise or give any other thing of value whatsoever, or purchase any stocks, bonds, securities or other property, for which shall be paid or agreed to be paid more than the fair and reasonable value thereof."

The inevitable inference is that the Palmetto with the Chrysler, both foreign corporations, are engaged in transacting insurance in Maine under an obvious subterfuge; that if any burden has been imposed upon interstate commerce it has been provided by the parties; that the Chrysler Treaty was designed to evade state insurance regulation in Maine; that the retailers of Chrysler automobiles in Maine, who are bound by law and fealty to respect organized governmental regulation therein and to observe its constitutional provisions and legislative enactments, are designated in the Chrysler Treaty as agents of the Palmetto for the special purpose of aiding and abetting it in making possible the procuration of insurance risks within the state by prearranged unlawful methods.

It is admitted that said retailer is instructed and does explain the Chrysler plan which includes the proffer of in-

surance by the Palmetto to the prospective purchaser of a Chrysler automobile; that he does furnish and assist in forwarding the application prepared for the particular purpose of effecting, and containing answers to predetermined questions which are requisite to establish, the relationship of insurer and insured; that he does become the instrumentality or agency by which liability is localized and effected, with proof of assent by the purchaser to the universal proposal for insurance as proffered by the Palmetto and explained by the retailer of a Chrysler automobile; who by the preliminary sale of his own property must prepare the way for consummation of an insurance risk; that he does accept in Maine the concealed consideration which has been advanced by him in anticipation of sale of the automobile and recovery of the premium in combination and simultaneously; that he is by the terms of the Chrysler Treaty the representative of the insurance company to keep it informed of future transfers of title and terminations of insurance risks, to accept and advance the settlement of claims for indemnity and encourage the satisfactory adjustment of losses for his and their benefit and future good will.

There can be no doubt that without the retailer's cooperation the terms of the insurance proposal could never be established or made known to the actual contracting parties. In fact, there is no other way that such parties could be introduced to each other for a realization of their insurance relations.

Second. (*a*) *The Chrysler Treaty is Violative of Local Statutes and of the Rule of State Comity.*

Section 37 of Chapter 48 of the Insurance Laws of the State of South Carolina, in which the Palmetto is domiciled, reads as follows:

> "No fire insurance company or association not incorporated under the laws of this state, authorized

to transact business here, shall make, write, place, or cause to be made, written or placed, any policy, duplicate policy, or contract of insurance of any kind or character, or any general or floating policy, upon property situated or located in this state, except after the said risk has been approved, in writing, by an agent who is a resident of this state, regularly commissioned by the company doing business in this state, who shall countersign, all policies so issued, and receive the commission therein when the premium is paid, and the State shall receive the license fees required by law to be paid on the premiums collected for insurance on all property located in this state."

Section 2, Chapter 2, of Part 4 of the Act of 1917, numbered 256, Laws of the State of Michigan, entitled "Fire, Marine, Automobile and other Insurance," reads as follows:

"All contracts of fire insurance upon property real or personal located in this state in companies not at the time of the making of such contracts duly authorized under the laws of this state to make such contracts are hereby declared to be void and unenforcible and no action at law or in equity shall be maintained on any such contract in any court."

Section 109, Chapter 53, of the Revised Statutes of Maine, reads as follows:

"When by the laws of any other state or country, any fines, penalties, licenses, fees, deposits or other obligations or prohibitions additional to or in excess of those imposed by the laws of this state upon foreign insurance companies and their agents are imposed on insurance companies of this state and their agents, the same fines, licenses, fees, deposits, obligations or prohibitions shall be imposed upon all insurance companies of each state or country and their agents doing business in or applying for admission to this state."

Hence, the principle contained in the Chrysler Treaty is violative of the laws of Michigan, where it was made, violative of the laws of South Carolina, where the Palmetto is incorporated, and violative of the reciprocal law of Maine which is in exact accord with the insurance provisions of both states in prohibiting unauthorized insurance companies of those states from transacting insurance within it.

These statutory prohibitions of South Carolina, Michigan and Maine are not in conflict with the constitutional prerogative of Congress "to regulate commerce with foreign nations and among the several states."

Paul v. Virginia, 8 Wallace U. S. 177.
N. Y. Life Ins. Co. v. Deer Lodge County,
231 U. S. 495.

"Comity due from one state to another is not required to be more than equal and reciprocal."

People v. Fire Association, Am. Rep. 44-380.

Where the Insurance Contracts of a Personal Character are Made.

A policy upon a "cargo" and "on account of whom it may concern" will inure to the benefit "of any person subsequently ascertained to have *such* an interest who adopts the insurance."

The word "such" in the context refers to some marine insurable interest in a cargo while in transit, and at times when it would be impossible on account of the variety and character of the interests involved to procure separate contracts of indemnity for the various parties who might have a community of interest in the transportation and ownership of commodities while they are in transit. Some of the insurable interests have been designated as applicable to marine risks.

Hooper v. Robinson, 98 U. S. 528.

The demand for marine insurance arose from public necessity and there is no occasion at present to extend it beyond its proper sphere or to superimpose upon it private contracts of insurance of physical property which has become fixed within the territorial jurisdiction of a state beyond Federal control.

To recur to the word "adopts" as used in the case just alluded to, the meaning of adoption in law has been judicially determined as follows: Adoption is in legal effect the making of a contract as of the date of the adoption."

McArthur v. Times Printing Co. 48 Minn. 319;
N. W. 216.
Gavitt v. Gouter, 42 Pa. St. 143,
Schreyer v. Turner Flouring Mills Co.
29 Oregon, 1.
43 Pacific, 719.

Therefore, adoption involves all the essentials of a new contract. In the case of the Chrysler Treaty there could have been no meeting of minds until sale in Maine, where the ultimate purchaser of a Chrysler automobile and his subsequent transferees assent to the terms of insurance proffered by the Palmetto, wherein the company has previously waived its right to investigate and reject the personal hazard in favor of customers of the Chrysler Company.

Herein are involved new parties and a new contract which was contemplated and arranged for in Michigan and was to be completed by the ultimate purchaser in Maine, by mailing an acceptance to the insurance proposal in Maine.

"A contract is complete where nothing further remains to be done to give either party a right to have it carried into effect, or, in other words, when the last act is done which is necessary to render the contract obligatory. Therefore, when the parties are residents of different states, the state where the final assent is given, or the last necessary act to complete it is done, is the place where the contract is made notwithstanding all preliminary arrangements were made in the other state."

Ford v. Buckeye Ins. Co. Am. Dec. 99-668.

Second. (*b*) *The Right of the State to Regulate All Kinds of Insurance.*

The Supreme Court of the United States decided that the business of insurance companies is purely intrastate and that "the right of a state legislature to regulate the conduct of corporations, domestic and foreign, of insurance as a business affected with a public interest" was indisputable.

Union Fire Ins. Co. v. Wanberg, 260 U. S. 73.

The same court has determined that state regulation applies, with equal force, to all kinds of insurance contracts, in the following words: "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" (marine insurance)

Hooper v. California, 155 U. S. 655,
239-509 U. S.

Insurance legislation is police regulation and it has been decided that "When the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce.

Savage v. Jones, 225 U. S. 525.

The doctrine of Sherlock v. Alling was reaffirmed as follows: "Legislation, in a great variety of ways may effect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution. ****** And it may be said generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within

its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

C. R. I. P. Railway Co. v. Arkansas, 219 U. S. 460.

And the right to affect commerce incidentally, in a reasonable enforcement of police regulations by the state, includes a right in the legislature to impose a fee or license for such purpose.

McLean v. Railroad, 203 U. S. 55.

In a dozen cases that assert the right of a state to affect commercial intercourse by legislation, six were interferences with the importation of commercial articles into states and six were restraints upon the carriers. All of these cases involved state enactments more or less affecting interstate or foreign commerce, but were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce.

If commerce is affected in this case that effect is very remote. It does not interfere with the right to dispose of an article of commerce nor the method of importation, but relates to something that is not commerce, is to be consummated after commercial relations are terminated, and has been superimposed by a foreign insurance company in an unwarrantable manner.

In fact, the complainant himself entered into the agreement, if such is the result, to burden his own commerce with a treaty or proposal to effect insurance between an unlicensed insurance company and the ultimate purchasers of his product before the proposed article of commerce was in existence or had become subject to interstate commercial regulation. And he has defeated the constitutional right of the purchaser to buy that article without being subjected, in every instance, to the payment of an arbitrary premium of indeterminate amount for an insurance policy of uncertain terms and doubtful validity, which the purchaser has never seen and relies upon the retailer to expound.

Furthermore, if the purchaser afterward secures other insurance upon the automobile the Chrysler Treaty withdraws its protection without rebate or return of unearned premium. It furnishes merely excess insurance and if the additional insurance is adequate will automatically extinguish its own obligation to contribution in case of loss. If the additional, or private, insurance contract as is customary in such policies, is limited to contribute to losses only in proportion to the total amount of indemnity involved, the result is the payment of premium for a liability for which the insured cannot recover.

Insurance regulation by the states is not a regulation of commerce, has never been surrendered by the states nor assumed by Congress. It should not be stricken down.

C. R. I. P. Railway v. Arkansas, 219 U. S. 462.
Reduction Company v. Sanitary Works, 199 U. S. 318.

The Appellants claim:

1. That the defendant is "attempting unlawfully to regulate and burden interstate commerce." Insurance is not commerce, and, in the case at bar, does not affect commerce.

Paul v. Virginia, 8 Wallace U. S. 183.

If it did, it has been held that "When the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the

foundation of the Government *because of the necessity that they should not remain unregulated.* Ibid, 403. ***** The power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected, and the power to *absolutely prohibit* additionally obtains *where the thing prohibited is not commerce,* and hence not embraced in either interstate or foreign commerce."

The Minnesota Rate Cases, 230, U. S. 402.

The fact is, that before the insurance is effected in Maine interstate commerce has terminated. The Chrysler claims that it has parted with all property in the automobiles since they are paid for by the retailers when delivered within the state.

The end of interstate commerce is indicated clearly in the following decision: "The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities not for consumption, but for resale to consumers. There is no relation of agency between the Supply Company and the distributing companies, or other relation except that of seller and buyer and the interest of the former in the commodity ends with its delivery to the latter, to which title and control pass absolutely. **** With delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is *intrastate business and subject to state regulation.*"

Kansas v. Kansas Natural Gas Co. 265 U. S. 306.

2. The defendant is charged with "depriving the plaintiff and said customers of the plaintiff of property *without due process of law.*"

Here the plaintiff must allude to the effect of strict interpretation and enforcement of the Maine statutes governing

insurance agents and brokers as deprivation of property without due process, but the Supreme Court has declared:

"That inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public health, safety and morals. The governmental power of self-protection cannot be contracted away, not can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

Beer v. Massachusetts, 97 U. S. 25.
Fertilizing Co. v. Hyde Park, 97 U. S. 659.
Barbier v. Connolly, 113 U. S. 27.
New Orleans Gas Co. v. Louisiana Gas Co.
115 U. S. 650.
Mugler v. Kansas, 123 U. S. 623.
Budd v. New York, 143 U. S. 517.
Northern Pacific Railway v. Duluth, 208 U. S. 596.

"And in the exercise of such" (police) "powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.

Terrace v. Thompson, 263 U. S. 217.

3. The defendant is accused of impairment of "the freedom of contract guaranteed by the Federal Constitution."

The doctrine of the court has been established and confirmed to the effect that "the exercise of the police power in the interest of public health and safety is to be maintained

unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the constitution."

Northern Pacific Railway v. Duluth, 208 U. S. 597.
Union Bridge Co. v. United States, 204 U. S. 395.
Chicago, Burlington & Quincy R. R. v. Illinois, 200 U. S. 592.

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to the purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is reasonable relation to the object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review."

It is but "an exercise of the sovereign right of government to protect lives, health, comfort, morals and general welfare of the people, and is paramount to any rights under contracts between individuals."

Chicago, B. & Quincy R. R. Co. v. McGuire, 219 U. S. 569.
Manigault v. Springs, 199 U. S. 480.

It has been asserted by the court that "as in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood *to be made* in reference to the possible exercise of the rightful authority of the Government and no obligation of a contract can extend to the defeat of legitimate government authority."

Louisville & Nashville R. R. v. Mottley, 219 U. S. 482.

In Adkins v. Childrens' Hospital, 261 U. S. 546, the court said:

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints", and asserted that "the existence of a public interest in any business to be affected" would provide an adequate reason for restraint.

The same court had already conceded "the right of a state legislature to regulate the conduct of corporations, domestic and foreign, of insurance as a business affected with a public interest."

National Union Ins. Co. v. Wanberg, 260 U. S. 73.
German Alliance v. Lewis, 233 U. S. 389.

"The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.

Blackwell v. Webster, 29 Fed. Rep. 615.

4. The defendant is charged with "denial of the equal protection of the law."

Like the claim of "deprivation of property without due process", this assumption cannot be maintained to defeat the operation of statutes providing for reasonable insurance regulation.

Neither the Fourteenth Amendment nor any other amendment "was designed to interfere with the power of a state, sometimes termed its police power, to promote the health, peace, morals, education and good order of its people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

Barbier v. Connolly, 113 U. S. 31.

"The Fourteenth Amendment ***** does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution."

Terrace v. Thompson, 263 U. S. 216.

The insurance enactments of Maine represent declarations of public policy and may be regarded as indicative of the wisdom of former legislatures. The mere fact that some of them have been in effect for more than fifty years is proof of long-continued exercise of the state's prerogative and evidence of their reasonable application to the needs of its people.

5. The final allegation made by the plaintiff is an attempt on the part of the defendant to "regulate, prohibit and burden" in Maine, "the making and performance of a contract lawfully made and to be performed" in Michigan.

All organized forms of government require, and it has been the dictum of the Supreme Court for many years, that "no contract with any person, individual or corporate, can impose restrictions upon the power of the states", in a reasonable enforcement of legislative enactments.

Minneapolis & St. Louis Railway v. Emmons,
149 U. S. 368.

And this would be true whether the plaintiff can prove that the Chrysler Treaty were made in Michigan and can be performed wholly within that state or not.

The State of Maine will lose, by the Chrysler Treaty, one and one-half per cent of all taxable premiums collected by virtue of the treaty, and the Palmetto has already conceded that the Chrysler certificates are insurance contracts required to be signed by local insurance agents, and that such premiums are taxable in other states like premiums collected within them through the agency system by authorized companies.

Whether a state can tax unauthorized insurance premiums is not the issue. The question is rather whether the taxation of unauthorized insurance premiums to residents of Maine is discriminatory to the extent of prohibition.

In the case at bar the premium tax loss represents what the state would have been legally entitled to impose and collect.

If a state can be deprived of its taxing power by the incontestability of a private contract made elsewhere, the same parties involved in this case can enter into a private contract to sell their product exempt from local taxation and local registration for one year. Such a policy must be accounted disastrous so far as state regulation is to be considered.

The motions should be dismissed.

Respectfully submitted,

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SUBJECT INDEX OF BRIEF

TABLE OF CASES CITED